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106TH CONGRESS *2d Session* | SENATE | REPORT 106–307

TO MAKE TECHNICAL CORRECTIONS TO THE STATUS OF CERTAIN LAND HELD IN TRUST FOR THE MISSISSIPPI BAND OF CHOCTAW INDIANS, TO TAKE CERTAIN LAND INTO TRUST FOR THAT BAND, AND FOR OTHER PURPOSES

JUNE 13, 2000.—Ordered to be printed

Mr. CAMPBELL, from the Committee on Indian Affairs, submitted the following

REPORT

[To accompany S. 1967]

The Committee on Indian Affairs, to which was referred the bill (S. 1967) to make technical corrections to the status of certain land held in trust for the Mississippi Band of Choctaw Indians, to take certain land into trust for that Band, and for other purposes, having considered the same, reports favorably thereon without amendment and recommends that the bill do pass.

PURPOSE

The purpose of S. 1967 is to declare that specified lands are held in trust for the Mississippi Choctaw Tribe; and provide that lands subsequently taken into trust are part of the Choctaw Reservation.

BACKGROUND

History of the Choctaw Indian Tribe

Throughout the 19th Century, the federal government and the State of Mississippi engaged in various, and generally unsuccessful, efforts to remove the Choctaw Indian Tribe to lands west of the Mississippi River. A number of treaties were negotiated, and sometimes ratified by the United States Senate, but the terms were rarely fulfilled by the federal government. For example, the Treaty at Doak's Stand, 7 Stat. 210 (1820) could not be executed because the land promised to the Choctaw by the United States was already occupied. In an effort to "encourage" the tribe to move west, the Mississippi Legislature enacted a law "purporting to abolish the Choctaw government and [imposing] a fine upon assuming the

role of chief."[1] As the Supreme Court explained, the numerous chapters in federal government's treatment of the Choctaw tribe are "best left to historians." The Supreme Court noted the palpable effect of this history on Congress:

> It is enough to say here that the failure of these attempts, characterized by incompetence, if not corruption, proved to be an embarrassment and an intractable problem for the Federal Government for at least a century.[2]

The Senate ratified the Treaty of Dancing Rabbit Creek in 1831 with the intent that it would be a final resolution to the Choctaw's tribe's presence in Mississippi. But the Treaty stopped short of requiring all Choctaws to leave the state. In fact, those who remained were to retain their Choctaw citizenship, although they were not to share an annuity that was provided for those who were removed. In addition, lands were reserved for those who remained behind. As a result of this policy, and the general unwillingness of the Indians to relocate, by the 1890's it was clear that a number of tribal members still resided in Mississippi. Nevertheless, it was not until 1916 that the federal government took affirmative steps to address the situation. In that year Congress appropriated $1,000 to investigate the condition of the Indians living in Mississippi. Subsequent appropriations were made to provide for medical care, housing, administration, schools, and land. However, the status of the lands acquired by the government was complicated by the fact that the lands were sold to individual Indians, rather then being held collectively.

When Congress sought to rehabilitate tribal governments, through the enactment of the Indian Reorganization Act of 1934 (IRA), the Mississippi Choctaw Tribe voted to organize under the IRA. To bring the Choctaw landholdings more in line with federal policy, which sought to consolidate Indian land ownership in each tribal government, a 1939 Act declared all lands previously purchased for the Choctaw tribe to be held in trust. In 1944, the Assistant Secretary of Interior declared that more than 15,000 acres were so held. Nevertheless the State of Mississippi resisted attempts to treat this land as an Indian reservation, even going so far as to argue that the IRA was not intended to apply to the Mississippi Choctaw Tribe. These issues were resolved by a decision of the United States Supreme Court in its 1978 decision in *United States* v. *John.*

In *United States* v. *John,* the Supreme Court ruled unanimously that the federal government's actions through 1939 were sufficient to bring these lands within the definition of "Indian reservation," as it is used to determine the scope of federal criminal jurisdiction. Moreover, "if there were any doubt about the matter in 1939, when * * * Congress declared that title to land previously purchased for the Mississippi Choctaws would be held in trust, the situation was completely clarified by the proclamation in 1944 of a reservation and the subsequent approval of the constitution and bylaws adopted by the Mississippi Band."[3]

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[1] *United States* v. *John,* 437 U.S. 634, 640 (1978).
[2] Id. at 643–4.
[3] Id. at 649.

The Supreme Court's decision permanently resolved any lingering questions about the status of those lands that were already held in trust for the tribe. It did not address, however, the effect of previous government policies on the tribe's land base. Specifically, the land held in trust for the tribe was not adequate to support the tribe's membership or the infrastructure needed to support the tribe's expanding and increasingly diversified economic base. To address its need for land, the tribe made use of the administrative process established by the IRA for having land taken into trust.

Choctaw application to have land taken into trust

Pursuant to 25 CFR § 151, the Mississippi Choctaw Tribe has filed applications with the Eastern Regional Office of the Bureau of Indian Affairs to have approximately 8,500 acres of land taken into trust. Under Part 151, CFR, the Secretary may accept title to land in trust for Indian tribes, and in some circumstances, members of such tribes. Evidence adduced at the Committee's hearing on S. 1967 indicates that these applications have not been acted upon for months or even years. Concerned about this situation, Mississippi Senators Lott and Cochran introduced S. 1967 to preserve tribal and federal resources by making the administrative process unnecessary with respect to the land addressed in S. 1967. The Mississippi Attorney General's Office also wrote a letter in support of this legislation, evidencing the ongoing cooperative relationship between the Choctaw Tribe and the State of Mississippi.

The unique history of the Choctaw tribe appears to make the administrative process more complicated than those of other Indian tribes. For example, unlike other Indian tribes, the Choctaw tribe does not have defined reservation boundary that circumscribes the eight Choctaw communities. In addition, the delay in obtaining approval of these applications has caused the tribe to prioritize its applications; forcing it to choose between land needed for housing, education, or economic development.

The ability to treat land as "Indian country" has proven to be an essential attribute of Congress' ability to carry out its Constitutional responsibility in the field of Indian Affairs. For example, when a tribe was removed from its aboriginal homeland, it was necessary for the federal government to guarantee that the tribe would continue to exercise governmental authority over those lands reserved for the tribe, often in a new state or territory. Similarly, when the federal government seeks to settle land claims, the parties will frequently negotiate to obtain a waiver of the tribe's claim in exchange for a federal guarantee that other lands will be acquired by or for the tribe and treated as "Indian country,"[4] In the case of the Choctaw tribe the "corruption and incompetence" described by the Supreme Court in its 1978 decision provides analogous responsibility to address the Choctaw tribe's need for additional tribal lands, even if liability is not present.[5]

[4] "The Tribes typically negotiate for a land base and a settlement fund sufficient to promise a stable cultural and economic future. The State negotiates for [its interests]. The settlement in the end usually bears little relation to the positions set forth in the initial complaints and answers in the case." Staff Memorandum Re: Veto of S. 366, Sen. Rep. 98–877 (1983).

[5] A number of courts have reached similar conclusions either based on the specific facts before the court, or the general result of the General Allotment Act and similar laws, See, e.g., *Board*

Continued

Another purpose of S. 1967 is to unify tribal land holdings, both physically and semantically. Physically, the bill will assist with consolidating tribal lands to reduce or eliminate confusion resulting from scattered holdings. As with other Indian tribes, the Choctaw tribe's current landholdings have more to do with the history of inconsistent federal policies applied to the tribe than its modern needs. By selectively adding to the lands already held in trust, the tribe will modernize its land-base. One federal judge characterized a similar endeavor as: "self-respecting, and for that matter self-denying people, trying to preserve their tribe as a viable entity and to maintain themselves with a modicum of dignity and self-support."

With respect to semantics, the Choctaw tribe explains that it will facilitate its collaboration with off-reservation entities, especially institutions like banks and financiers, if the same commonly used term can be employed to describe all of the land taken into trust for the tribe. The tribe is correct when it notes that Supreme Court has assiduously refused to distinguish the nature of tribal or federal authority over Indian lands based on the labels used to describe them. For example, the government has used variety of phrases including trust lands, formal reservation lands, informal reservation lands, and others. *Oklahoma Tax Commission* v. *Citizen Band of Potawatomi Tribe of Oklahoma,* 498 U.S. 505 (1991). Nevertheless, the use of different terms is confusing to those entities that are new to Indian country. Also, it probably adds to the transaction costs of those doing business with the tribe if they must independently satisfy themselves that there is no legal distinction between land that is "held in trust" and "reservation lands." The bill seeks to avert such confusion by bringing all of the tribe's trust lands under the same label as "formal reservation lands." This is especially important in the case of the Choctaw tribe. As the Committee has been informed on a number of occasions, the exercise of tribal sovereignty can be used to offset other disadvantages that are frequently associated with Indian country. This approach can only be pursued if a tribe's jurisdiction over a parcel or project is unassailable. In this case, the Choctaw tribe's approach to economic development involves "turning marginal economic opportunities into larger economic successes." By confirming the reservation-status of these lands, the tribe is free to concentrate on facilitating economic development by reducing the costs that are under its control.[6]

One of the questions addressed by the Committee is whether legislation taking land into trust should replace or supplant the administrative process. There appears to be a consensus that in general these decisions should be left to the administrative process and legislative decisions to take land into trust should be reserved for specific instances where a case can be made that a unique set of circumstances make it more appropriate for Congress to take the matter in hand. The facts in this matter present such a case. In addition, the record developed through the Committee's hearing on

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of County Commissioners v. *Seber,* 318 U.S. 705 (1943), *Chase* v. *McMasters,* 573 F.2d 1011 (8th Cir. 1978), *Stevens* v. *Commissioner,* 452 F.2d 741 (9th Cir. 1971), and *City of Takoma* v. *Andrus,* 457 F. Supp. 342 (D. D.C. 1978), and *Jicarilla Apache Tribe* v. *State of New Mexico,* 742 F. Supp. 1487 (D. New Mex. 1990).

[6] See, generally, Ferrara, The Choctaw Revolution (1998).

S. 1967 demonstrates that some or all of the effect of taking this land into trust will be more than offset by the tribe's effect on the economy in south central Mississippi. See, The Economic Impact of the Mississippi Bank of Chocaw Indians and Their Affiliated Enterprises on the State of Mississippi, University of Southern Mississippi, June 15, 1990.

Finally, the Choctaw tribe has committed significant resources to resolving any concerns that the United States will be assuming legal liability based on existing environmental conditions on the lands to be held in trust under this Act.

LEGISLATIVE HISTORY

S. 1967 was introduced on November 18, 1999 by Senator Cochran for himself and Senator Lott, and referred to the Committee on Indian Affairs. On March 29, 2000, the Committee held a legislative hearing on the bill.

COMMITTEE RECOMMENDATION AND TABULATION OF VOTE

In an open business session on May 3, 2000, the Committee on Indian Affairs, by a voice vote, voted for the bill to be reported as it was introduced and ordered the bill reported to the Senate, with the recommendation that the Senate do pass S. 1967 as reported.

SECTION-BY-SECTION ANALYSIS

Section 1. Status of certain Indian lands

Subsection (a)(1) addresses the status of lands acquired in trust for the Tribe since December 23, 1944. The Supreme Court's 1978 decision recognized that a December 1944 proclamation by the Assistant Secretary established reservation-status for all lands purchased by the Choctaw tribe up to that date. Similarly, this provision will ensure reservation status for those lands taken into trust since that date, and into the future.

Subsection (a)(2) provides that those lands held in fee by the Choctaw tribe as shown in the report entitled "Report on Fee Lands owned by the Mississippi Band of Choctaws," dated September 28, 1999, on file in the Office of the Superintendent, Choctaw Agency, BIA, is declared to be held in trust for the Tribe. This will ensure the trust status of those lands acquired by the tribe and listed in the report provided to the Choctaw Agency of the BIA. Pursuant to subsection (a)(1), these lands will also be treated as part of the Choctaw reservation.

Subsection (a)(3) addresses any concerns that the bill is intended to evade or gain an advantage with respect to the use of these lands for gaming purposes. Under the Indian Gaming Regulatory Act of 1988 (IGRA), 25 U.S.C. § 2700 et seq. there is a general prohibition on the use of "noncontiguous" lands for gaming purposes if they were acquired by the Secretary in trust for a tribe after October 17, 1988. The Choctaw tribe has informed the Committee that it wishes to avoid even the slightest appearance that having the land taken into trust through legislation will establish an advantage or an exception in the use of land for gaming purposes. In other words, the tribe wishes to ensure that with respect to the IGRA these lands have the same status they would possess if they were taken into trust through the administrative process. In gen-

eral, there is no argument that the status of the lands taken into trust or declared to be part of the Choctaw reservation will be any different if the lands were taken into trust under this bill versus the administrative process. However, the IGRA contains an exception the October 17, 1988 prohibition if the land acquired for a tribe constitutes a tribe's "initial reservation." While it is very unlikely that this exception could factually be applied to the Choctaw tribe's reservation, the tribe would rather explicitly eliminate any legal basis for its application, thereby obviating any need to make the case that the provision is factually inapplicable.

Similarly, subsection (b) will resolve any question that S. 1967 is intended to procure any special advantage with respect to the application of any other provisions of the IGRA.

COST AND BUDGETARY CONSIDERATION

The cost estimate for S. 1967 as calculated by the Congressional Budget Office, is set forth below:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, May 12, 2000.

Hon. BEN NIGHTHORSE CAMPBELL,
Chairman, Committee on Indian Affairs,
U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for S. 1967, a bill to make technical corrections to the status of certain land held in trust for the Mississippi Band of Choctaw Indians, to take certain land into trust for that band, and for other purposes.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Lanette Keith.

Sincerely,

BARRY B. ANDERSON
(For Dan L. Crippen, Director).

Enclosure.

S. 1967—A bill to make technical corrections to the status of certain land held in trust for the Mississippi Band of Choctaw Indians, to take certain land into trust for that band, and for other purposes

S. 1967 would allow certain land owned by the Mississippi Band of Choctaw Indians to be held by the federal government in trust for the benefit of the band. CBO estimates that enacting this bill would have no significant impact on the federal budget. S. 1967 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act and would have no significant impact on the budgets of state, local or tribal governments.

The CBO staff contact is Lanette Keith. This estimate was approved by Peter H. Fontaine, Deputy Assistant Director for Budget Analysis.

REGULATORY IMPACT STATEMENT

Paragraph 11(b) of XXVI of the Standing Rules of the Senate requires that each report accompanying a bill to evaluate the regulatory paperwork impact that would be incurred in carrying out the bill. The Committee believes that S. 1967 will have a minimal regulatory or paperwork impact.

EXECUTIVE COMMUNICATIONS

The Committee has received no Executive Communications concerning S. 1967.

CHANGES IN EXISTING LAW

In compliance with subsection 12 of rule XXXVI of the Standing Rules of the Senate, the Committee notes the following changes in existing law: S. 1967 will not effect any changes in existing law.